

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 20036050
R. CONDOS AND)
G. HOLMES)
_____)

OPINION

Representing the Parties:

For Appellants: Joseph P. Lucas
For Respondent: Anne Mazur, Specialist

S. RIDENOUR, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, R. Condos and G. Holmes (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$41,892.50, plus applicable interest, for the 2016 tax year.¹

Appellants waived their right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUES

1. Whether appellants are liable for the demand penalty.
2. Whether appellants have established that the collection cost recovery fee should be abated.

FACTUAL FINDINGS

1. Appellants did not file a timely 2016 California income tax return.
2. FTB obtained information indicating that appellant-Condos received income sufficient to prompt a filing requirement for the 2016 tax year. On March 15, 2018, FTB issued

¹ Appellants’ claim for refund requested a refund of a late-filing penalty, demand penalty, filing enforcement fee, and collection cost recovery fee. However, as discussed below, FTB abated the late-filing penalty and the filing enforcement fee. Therefore, only the demand penalty of \$41,575.50 and collection cost recovery fee of \$317, plus applicable interest, are at issue on appeal.

- appellant-Condos a Demand for Tax Return (Demand), which required that he reply no later than April 18, 2018, by either filing his tax return for 2016, providing evidence showing he already filed his return, or explaining why he did not have a filing obligation for the 2016 tax year.
3. When appellant-Condos did not timely respond to the Demand, FTB issued appellant-Condos a Notice of Proposed Assessment (NPA) on May 14, 2018. The NPA estimated appellant-Condos' income based on the information FTB received, and proposed a tax liability, a late-filing penalty, a demand penalty, and a filing enforcement fee, plus applicable interest.
 4. Subsequently, appellants filed their joint 2016 California resident income tax return on July 23, 2018. Appellants reported lower amounts for their California taxable income and tax liability, as well as their self-assessed late-filing penalty and interest, than the amounts listed on the NPA. Appellants remitted payment with the return.
 5. FTB accepted appellants' return as filed, abated the late-filing penalty and the filing enforcement fee, and reduced the demand penalty. After payments were made towards appellants' 2016 account by credit transfers from other tax years, an outstanding liability remained.
 6. When appellants failed to pay the balance due, FTB initiated involuntary collection action. FTB sent appellants a Final Notice Before Levy and Lien (Final Notice) on October 19, 2018, for the remaining balance due. The Final Notice informed appellants that if FTB did not receive payment in full within 30 days from the notice date, FTB may, among other things, impose a collection cost recovery fee.
 7. When appellants failed to pay the balance due within 30 days, FTB imposed a collection cost recovery fee.
 8. Subsequently, appellants made a payment on April 3, 2019, and appellants' outstanding liability was fully satisfied on July 10, 2019. Appellants filed a claim for refund, which FTB denied.
 9. This timely appeal followed.
 10. As relevant here, FTB previously issued appellant-Condos: (1) an NPA dated July 25, 2016, which was issued after appellant-Condos did not respond to FTB's Demand, dated May 24, 2016, for appellant-Condos' 2012 tax return; (2) an NPA dated

August 1, 2016, which was issued after appellant-Condos did not respond to FTB's Request for Tax Return (Request), dated May 31, 2016, for appellant-Condos' 2013 tax return; (3) an NPA dated February 16, 2016, which was issued after appellant-Condos did not respond to FTB's Request, dated December 16, 2015, for appellant-Condos' 2014 tax return; and (4) an NPA dated June 5, 2017, which was issued after appellant-Condos did not respond to FTB's Demand, dated April 4, 2017, for appellant-Condos' 2015 tax return.² Appellants subsequently filed joint California resident income tax returns for the 2012, 2013, 2014, and 2015 tax years.

DISCUSSION

Issue 1: Whether appellants are liable for the demand penalty.

California imposes a penalty for the failure to file a return or to provide information upon FTB's demand to do so, unless the taxpayer shows that the failure to respond to the Demand is due to reasonable cause and not due to willful neglect. (R&TC, § 19133.) With respect to individual taxpayers, FTB will only impose a demand penalty if (1) the taxpayer fails to respond to a current Demand and (2) FTB issued an NPA under the authority of R&TC section 19087(a) after the taxpayer failed to timely respond to a Request or a Demand at any time during the four taxable years preceding the year for which the current Demand is being issued. (Cal. Code Regs., tit. 18, § 19133(b)(1)-(2).)

The first requirement is met because FTB issued a 2016 Demand to appellant-Condos on March 15, 2018, but appellant-Condos did not provide a response. For purposes of examining the second requirement, we note the following tax years and dates for which corresponding notices were issued. For the 2012 tax year, FTB issued a May 24, 2016 Demand and a July 25, 2016 NPA. For the 2013 tax year, FTB issued a May 31, 2016 Request, and an August 1, 2016 NPA. For the 2014 tax year, FTB issued a December 16, 2015 Request, and a

² Originally, as to the requirements of California Code of Regulations, title 18, (Regulation) section 19133(b)(2), FTB presented evidence that FTB previously issued appellant-Holmes: an NPA dated April 14, 2014, which was issued after appellant-Holmes did not respond to FTB's Request, dated January 23, 2014, for appellant-Holmes' 2012 tax return; and an NPA dated March 23, 2015, which was issued after appellant-Holmes did not respond to FTB's Demand, dated January 21, 2015, for appellant-Holmes' 2013 tax return. Thereafter, in response to additional briefing requested by the Office of Tax Appeals, FTB stated that it was withdrawing its position that the notices previously issued to appellant-Holmes satisfy the requirements of Regulation section 19133(b)(2), and presented new evidence of the notices issued to appellant-Condos. As such, when analyzing whether the requirements of Regulation section 19133(b)(2) have been met in this case, we look solely to the notices issued to appellant-Condos.

February 16, 2016 NPA. For the 2015 tax year, FTB issued an April 4, 2017 Demand, and a June 5, 2017 NPA. Therefore, since the 2012, 2013, and 2014 NPAs were all issued in 2016, and the 2015 NPA was issued in 2017, they were not issued “during” the four tax years prior to 2016. As a result, the prerequisites of Regulation section 19133 are not satisfied, and the demand penalty is abated.

Issue 2: Whether appellants have established that the collection cost recovery fee should be abated.

R&TC section 19254(a)(1) requires FTB to impose a collection cost recovery fee when FTB notifies a taxpayer that the continued failure to pay an amount due may result in the imposition of the fee, and the taxpayer fails to timely pay the amount due in response to the notice. Once FTB properly imposes the fee, there is no language in the statute that would excuse the fee for any reason, including reasonable cause. (See *Appeal of Auburn Old Town Gallery, LLC*, 2019-OTA-319P.)

Here, FTB mailed appellants a Final Notice dated October 19, 2018, which informed appellants that the failure to pay the liability within 30 days of the Final Notice may result in collection action and imposition of a collection cost recovery fee. Since appellants failed to pay the liability after receiving notice that continued failure to pay the liability may result in imposition of the fee, imposition of the collection cost recovery fee was required under R&TC section 19254(a)(1). Appellants did not make payment until April 3, 2019. FTB has no authority to abate or modify this fee. Therefore, we sustain FTB’s imposition of the collection cost recovery fee.

HOLDINGS

1. Appellants are not liable for the demand penalty.
2. Appellants have not established that the collection cost recovery fee should be abated.

DISPOSITION

The demand penalty shall be abated and refunded, with applicable interest. FTB’s action in denying appellants’ claim for refund is otherwise sustained.

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Sheriene Anne Ridenour
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Sheriene Anne Ridenour
 Administrative Law Judge

We concur:

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Tommy Leung
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Tommy Leung
 Administrative Law Judge

DocuSigned by:
Suzanne B. Brown
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Suzanne B. Brown
 Administrative Law Judge

Date Issued: 3/9/2021